[BILLING CODE: 4810-33-P]

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket No. 03-17]

Preemption Determination and Order

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is issuing this Determination and Order, attached as an appendix to this Notice, in response to a request from National City Bank, National City Bank of Indiana, and their operating subsidiaries, National City Mortgage Company and First Franklin Financial Company (referred to collectively herein as National City). The request asks the OCC to determine whether the Georgia Fair Lending Act (GFLA)[1] applies to the banks and their operating subsidiaries, and to issue an appropriate order. National City asserts that the GFLA is preempted under various provisions of Federal law and that, accordingly, the OCC should conclude that the Georgia law does not apply to it. For the reasons summarized here and described in detail in the appendix, the OCC has concluded that the provisions of the GFLA affecting national banks' real estate lending are preempted by Federal law. Therefore, we are issuing an order providing that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia.

[1] The GFLA is codified at GA Code. Ann. §§ 7-6A-1 et seq.

FOR FURTHER INFORMATION CONTACT: Michele Meyer, Counsel, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874-5090.

SUPPLEMENTARY INFORMATION:

In brief, the reasons supporting our Determination and Order are as follows:

- National banks' authority to engage in real estate lending activities derives exclusively from Federal law. Under applicable Federal preemption principles, based on the Supremacy Clause of the U.S. Constitution and articulated by the U.S. Supreme Court, a state law may not modify a Congressional grant of power to national banks by limiting, conditioning, or otherwise impermissibly affecting a national bank's exercise of that power.

- The Federal statute that authorizes national banks' real estate lending activities, 12 U.S.C. 371, precludes application of many provisions of the GFLA to national banks. First, by its terms, the statute grants real estate lending power unconditioned by the application of any state's law. As it said in Barnett Bank of Marion County, N.A. v. Nelson,[2] the Supreme Court ordinarily finds that state law conditions on the exercise of national bank powers are preempted if Congress has not expressly directed the application of state law. Second, the text of the statute specifically gives the OCC authority to determine the "restrictions and requirements" that apply to national banks' real estate lending activities. The exclusion of state authority in this regard is consistent with the history of the statute, which has, since its inception, imposed only Federal limits and conditions on national banks' real estate lending activities.

- National banks' real estate lending standards are subject to a comprehensive Federal regulatory framework that addresses the types of abusive and predatory practices that the GFLA

[2] 517 U.S. 25 (1996).

seeks to prohibit. In addition, the OCC has recently issued detailed guidance applicable to national banks' mortgage originations, use of mortgage brokers, and purchases of loans from others. This guidance targets abusive and predatory practices and will be administered by the OCC as part of its comprehensive supervision of national banks, in addition to the already-applicable Federal restrictions on high-cost real estate lending, Federal consumer protections and disclosure requirements that apply to all home mortgage lending, and Federal standards that require national banks to base lending decisions on the borrower's ability to repay and not the foreclosure value of the collateral.

- The OCC regulations implementing 12 U.S.C. 371 currently provide that certain types of state laws do not apply to national banks. For instance, part 34 of our rules says expressly that state laws concerning the schedule for the repayment of principal and interest and state laws concerning the term to maturity of a loan do not apply to national banks. Thus, Federal law, comprised of the statute and OCC regulations, already preempts the GFLA provisions that modify a national bank's real estate lending authority by imposing limits or restrictions that concern the schedule for repayment of principal and interest or the term to maturity of a loan.

- Section 371 and our rules also preempt the GFLA provisions that, pursuant to the Barnett standards and the growing body of lower Federal court case law applying those standards, impose conditions on, or otherwise impermissibly affect, a national bank's exercise of its real estate lending powers. Thus, provisions of the GFLA that prescriptively prohibit or limit practices that are lawful under Federal law (but, in many cases, subject to Federal standards directed at eliminating abusive or predatory practices) also do not apply to national banks.

- Some provisions of the GFLA purport to limit the interest a national bank may charge for certain types of loans. As the Supreme Court has recently reaffirmed, the rate of interest that is permissible for national banks is determined exclusively by Federal law, at 12 U.S.C. 85. Section 85 permits national banks to charge the most favorable rate permitted by the laws of the state in which the bank is located, regardless of where the borrower is located. Under this standard, National City uses the most favored lender rates of Indiana, not Georgia, and thus is not subject to limits on the rates of interest imposed by the GFLA. (Moreover, national banks located in Georgia are not subject to the GFLA provisions concerning interest. The Office of Thrift Supervision has previously determined that the GFLA does not apply to Federal savings associations. By virtue of the parity provision in the GFLA, that law also would not apply to a Georgia state savings association. Thus, for purposes of section 85, a Georgia state savings association is the most favored lender with respect to the types of loans covered by the GFLA, and, accordingly, a national bank located in Georgia is similarly not subject to limits on the rate of interest it may charge for loans within the scope of the GFLA.)

- Other provisions of the GFLA purport to limit the non-interest fees a national bank may charge in connection with certain types of loans. These provisions are preempted because they are inconsistent with national banks' well recognized authority to establish non-interest fees pursuant to the national bank powers provisions of 12 U.S.C. 24(Seventh) and the OCC's rules that govern national bank fees.

- The GFLA is also preempted with respect to national bank operating subsidiaries. Federal law authorizes national banks to conduct through operating subsidiaries activities that are permissible for the bank itself. Activities conducted through operating subsidiaries are subject to the same terms and conditions as apply to the parent bank and, pursuant to OCC regulations, are subject to state law only to the extent that the parent bank is subject to state law.

This Determination and Order provides that the GFLA does not apply to National City. Because our conclusions rest on an analysis of the legal effects of the GFLA under Constitutional preemption principles, they would not differ with respect to any other national bank or national bank operating subsidiary engaged in real estate lending activities in Georgia. The scope of our Order providing that the GFLA is preempted therefore includes any national bank or national bank operating subsidiary that is engaged in real estate lending activities in Georgia.

Finally, although National City has asked us to address whether Federal law occupies the field of real estate lending regulation, such that no state real estate lending law applies to national banks or their operating subsidiaries, our Determination and Order does not take up that issue. National City's request asked us to review only one state's law, the GFLA. A conclusion that Federal law occupies the field of real estate lending regulation would have implications beyond the applicability of the Georgia law. For that reason, we believe it is appropriate to consider the question of occupation of the field, as that theory may apply in the case of real estate lending, in a rulemaking. Contemporaneously with the issuance of this Determination and Order, therefore, we are initiating a rulemaking that addresses that issue.

Date: ___________________________

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John D. Hawke, Jr.

Comptroller of the Currency

Appendix

DETERMINATION AND ORDER

IN THE MATTER OF NATIONAL CITY BANK, NATIONAL CITY BANK OF INDIANA, AND THEIR OPERATING SUBSIDIARIES

INTRODUCTION AND SUMMARY CONCLUSIONS

The Office of the Comptroller of the Currency (OCC) is issuing this Determination and Order in response to a request from National City Bank, National City Bank of Indiana, and their operating subsidiaries, National City Mortgage Company and First Franklin Financial Company (referred to collectively herein as National City). The request asks the OCC to determine whether the Georgia Fair Lending Act (GFLA)[1] applies to the banks and their operating subsidiaries, and to issue an appropriate order. National City asserts that the GFLA is preempted under various provisions of Federal law and that, accordingly, the OCC should conclude that the Georgia law does not apply to it. For the reasons summarized here and described in detail later in this Determination and Order, the OCC has concluded that the provisions of the GFLA affecting national banks' real estate lending are preempted by Federal law. Therefore, we are issuing an order providing that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia.

In brief, the reasons supporting our Determination and Order are as follows:

- National banks' authority to engage in real estate lending activities derives exclusively from Federal law. Under applicable Federal preemption principles, based on the Supremacy Clause of the U.S. Constitution and articulated by the U.S. Supreme Court, a state law may not

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modify a Congressional grant of power to national banks by limiting, conditioning, or otherwise impermissibly affecting a national bank's exercise of that power.

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- National banks' real estate lending standards are subject to a comprehensive Federal regulatory framework that addresses the types of abusive and predatory practices that the GFLA seeks to prohibit. In addition, the OCC has recently issued detailed guidance applicable to national banks' mortgage originations, use of mortgage brokers, and purchases of loans from others. This guidance targets abusive and predatory practices and will be administered by the OCC as part of its comprehensive supervision of national banks, in addition to the already-applicable Federal restrictions on high-cost real estate lending, Federal consumer protections and disclosure requirements that apply to all home mortgage lending, and Federal standards that require national banks to base lending decisions on the borrower's ability to repay and not the foreclosure value of the collateral.

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- The OCC regulations implementing 12 U.S.C. 371 currently provide that certain types of state laws do not apply to national banks. For instance, part 34 of our rules says expressly that state laws concerning the schedule for the repayment of principal and interest and state laws concerning the term to maturity of a loan do not apply to national banks. Thus, Federal law, comprised of the statute and OCC regulations, already preempts the GFLA provisions that modify a national bank's real estate lending authority by imposing limits or restrictions that concern the schedule for repayment of principal and interest or the term to maturity of a loan.

- Section 371 and our rules also preempt the GFLA provisions that, pursuant to the Barnett standards and the growing body of lower Federal court case law applying those standards, impose conditions on, or otherwise impermissibly affect, a national bank's exercise of its real estate lending powers. Thus, provisions of the GFLA that prescriptively prohibit or limit practices that are lawful under Federal law (but, in many cases, subject to Federal standards directed at eliminating abusive or predatory practices) also do not apply to national banks.

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- The GFLA is also preempted with respect to national bank operating subsidiaries. Federal law authorizes national banks to conduct through operating subsidiaries activities that are permissible for the bank itself. Activities conducted through operating subsidiaries are subject to the same terms and conditions as apply to the parent bank and, pursuant to OCC regulations, are subject to state law only to the extent that the parent bank is subject to state law.

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I. BACKGROUND

A. Relevant Provisions of State and Federal Law and Regulations

1. The Georgia Fair Lending Act

The GFLA became effective October 1, 2002. As originally enacted, the GFLA restricted the ability of creditors or servicers to charge certain fees and engage in certain practices for three categories that it defined: "home loans," "covered home loans," and "high-cost home loans." Whether a loan was covered by one of these categories depended on the annual percentage rate and the amount of points and fees charged.[3] All "home loans" were subject to certain restrictions on the terms of credit and loan-related fees, including prohibitions on the financing of credit insurance, debt cancellation or suspension coverage, and limitations on late fees and payoff statement fees.

In addition to the restrictions on "home loans," "covered home loans" were subject to restrictions on the number of times a loan could be refinanced and the circumstances in which a refinancing could occur. For example, the GFLA prohibited a creditor from refinancing an existing home loan that was less than five years old with a "covered home loan" that did not provide a reasonable "tangible net benefit" to the borrower, considering all the circumstances.

"High-cost home loans" were subject to the restrictions on "home loans" and "covered home loans," as well as numerous disclosure requirements and restrictions on the terms of credit and loan-related fees. Creditors were required to disclose to borrowers that the loan is high-cost, and borrowers were required to be provided with certain loan counseling before the creditor could make the loan. In addition, the GFLA prohibited certain pre-payment penalties; balloon payments; negative amortization; increases in interest rates after default; advance payments from loan proceeds; fees to modify, renew, extend, amend, or defer a payment; and accelerating payments at the creditor's or servicer's sole discretion.

The original GFLA provided a private right of action for borrowers against lenders and mortgage brokers for injunctive and declaratory relief as well as for actual, statutory, and punitive damages, and permitted recovery of a plaintiff's attorney's fees. In addition, the Georgia Attorney General, district attorneys, the Commissioner of Banking and Finance and, with respect to the insurance provisions, the Commissioner of Insurance were given the jurisdiction to enforce the GFLA through their general regulatory powers and civil processes permitted under state law.

The original GFLA also provided that any purchaser or assignee of a high-cost home loan would be subject to all affirmative claims and defenses that the borrower could assert against the original lender. This extension of lender liability to assignees and purchasers had the potential to seriously impede the secondary market for Georgia mortgage loans and, following the enactment of the original GFLA, Moody's Investors Service concluded that including GFLA-covered loans in securitizations was too risky, causing lenders to scale back loans in the state and leading issuers to remove Georgia loans from securitizations. Standard and Poor's also announced that it would no longer rate mortgage-backed securities that included Georgia mortgage loans.

On March 7, 2003, the Georgia legislature amended the GFLA. The amendments eliminated the "covered home loan" category, but all of the original GFLA restrictions on "high-cost home loans" remain in effect under the current version of the law. The amendments did not change the civil liability provisions applicable to loan originators and mortgage brokers. The amendments did, however, limit purchaser or assignee liability by providing a due diligence defense in the event of a borrower claim and by capping the amount of the purchaser's or

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[3] See GFLA § 7-6A-2.

assignee's potential liability. However, Moody's and Standard and Poor's still apply significant limits on their willingness to rate mortgage-backed securities that include Georgia high-cost home loans.

As amended, the GFLA provides that if the GFLA has been determined to be preempted by Federal law for Federally-chartered institutions, the comparable state-chartered institutions (e.g. state banks, thrifts, trust companies, or their subsidiaries) will likewise not be subject to the GFLA.[4] Under this parity law, most of the provisions in the GFLA are already inapplicable to state-chartered savings and loan associations because the OTS has determined that most of the GFLA is inapplicable to Federally-chartered thrifts.[5]

2. Federal Law and Regulations

The real estate lending activities covered by the GFLA are authorized for national banks by Federal law and regulated under Federal standards.

a. National banks' real estate lending authority

Federal law authorizes national banks to engage in real estate lending activities and vests in the OCC comprehensive authority to regulate and supervise those activities:

> [a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section

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[4] The statute provides that "[t]he provisions of this chapter shall not apply to any bank, trust company, savings and loan, savings bank, credit union, or subsidiary thereof, respectively, that is chartered under the laws of this state or any other state only to the extent federal law precludes or preempts or has been determined to preclude or preempt the application of the provisions of this chapter to any federally chartered bank, trust company, savings and loan, savings bank, credit union, or subsidiary thereof, respectively, and such federal preclusion or preemption shall apply only to the same type of state chartered entity as the federally chartered entity affected; provided, however, the provisions of this chapter . . . shall be applicable to an independent mortgage broker for any loan originated or brokered by the broker that is initially funded by any state or federally chartered bank, trust company, savings and loan, savings bank, or credit union." GFLA § 7-6A-12.

[5] See OTS Op. Chief Counsel, P-2003-1 (Jan. 21, 2003), available at http://www.ots.treas.gov/docs/56301.pdf.

1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.[6]

The exercise of the powers granted by section 371 is not conditioned on compliance with any state requirement, but subject only to a Federal law and such rules and regulations as the Comptroller may prescribe.[7]

The OCC has implemented section 371 in regulations set forth at 12 CFR part 34.[8] Twelve CFR 34.3 establishes the general rule that a national bank and its operating subsidiaries may engage in real estate lending, and qualifies this rule by reference only to the "terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order." Twelve CFR 34.4(a) expressly provides that five types of state law limitations are not applicable to real estate loans made by national banks and their operating subsidiaries:

(a) Specific preemption. A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3 without regard to State law limitations concerning:

(1) The amount of a loan in relation to the appraised value of the real estate;

(2) The schedule for the repayment of principal and interest;

(3) The term to maturity of the loan;

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6 12 U.S.C. 371(a). The cross-reference in this provision is to the Federal requirement for safety and soundness standards that apply to real estate lending. The standards for national banks and their operating subsidiaries are set forth in 12 CFR part 34, Subpart D, Appendix A.

7 Federal legislation occasionally provides that national banks shall conduct certain activities subject to state law standards. For example, national banks conduct insurance sales, solicitation, and cross-marketing activities subject to certain types of state restrictions expressly set out in the Gramm-Leach-Bliley Act (GLBA). See 15 U.S.C. 6701(d)(2)(B). There is no similar Federal legislation subjecting national banks' real estate lending activities to state law standards.

8 Some of the OCC's regulations, such as part 34, apply by their terms to national bank operating subsidiaries. See 12 CFR 34.1(b). As explained below, however, a national bank operating subsidiary is treated the same as its parent bank and, thus, is also subject to OCC regulations that do not expressly refer to national bank operating subsidiaries.

(4) The aggregate amount of funds that may be loaned upon the security of real estate; and

(5) The covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

Twelve CFR 34.4(b) states:

The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks.

b. Permissible rate of interest for national banks

The limitations on charges that comprise rates of interest on loans by national banks are determined exclusively by Federal law.[9] Under 12 U.S.C. 85, a national bank is authorized to charge interest based on the laws of the state in which the bank is located.[10] OCC regulations further provide that:

A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state.[11]

This "most favored" lender status permits a national bank to contract with borrowers in any state for interest at the maximum rate permitted for any state-chartered or licensed lending institution by the law of the state in which the national bank is located.

c. National banks' authority to charge fees

Twelve U.S.C. 24(Seventh) authorizes a national bank to engage in activities that are part of, or incidental to, the business of banking[12] as well as to engage in certain specified activities

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[9] See Beneficial Nat'l Bank v. Anderson, 123 S.Ct. 2058 (2003).
[10] See Marquette Nat'l Bank of Minneapolis v. First of Omaha Service Corp., 439 U.S. 299 (1978).
[11] 12 CFR 7.4001(b); see also Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855 (6th Cir. 1972).

listed in the statute. Mortgage lending is expressly authorized for national banks and is thus inarguably part of the business of banking. Moreover, "negotiating . . . promissory notes" is one of the activities specified in section 24(Seventh). A bank's authority to provide these products or services to its customers necessarily encompasses the ability to charge a fee for the product or service.[13]

The authority to charge fees for the bank's services is expressly set out in 12 CFR 7.4002(a), which provides:

> (a) Authority to impose charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges.[14]

d. Standards applicable to national bank operating subsidiaries

Pursuant to their authority under 12 U.S.C. 24(Seventh) to exercise "all such incidental powers as shall be necessary to carry on the business of banking," national banks may use separately incorporated entities to engage in activities that the bank itself is authorized to conduct. The OCC's Operating Subsidiary Rule, codified at 12 CFR 5.34, specifies the licensing

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[12] The powers clause of section 24(Seventh) provides that a national bank may "exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24(Seventh). See NationsBank v. Variable Annuity Life Ins. Corp., 513 U.S. 251 (1995) (the "business of banking" is not limited to the list of powers enumerated in section 24(Seventh)).

[13] Cf. Franklin Nat'l Bank v. New York, 347 U.S. 373, 377 (1954) (stating, in the context of bank advertising, "[w]e cannot believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business.").

[14] A bank's authority in this, as in all other, areas must be exercised in a manner that is consistent with safe and sound banking practices. Paragraph (b) of section 7.4002 sets out the factors that the bank should consider to ensure that its process for setting its fees and charges is consistent with safety and soundness. If a bank uses a decisionmaking process that takes these factors into consideration, then there is no supervisory impediment to the bank exercising its discretionary authority to charge non-interest fees and charges pursuant to § 7.4002(a). National City has not sought, nor provided information to support, a determination by the OCC that its processes in deciding to charge the fees at issue here are consistent with safe and sound banking. However, as we have pointed out in other contexts, national banks are not required to obtain a determination from the OCC that their fees comport with § 7.4002 in order to be able to exercise the federal power to charge fees. See, e.g., OCC Interpretive Letter No. 934 (Aug. 20, 2001).

requirements when national banks seek permission from the OCC to conduct business through an operating subsidiary.[15] Pursuant to this licensing process, the OCC licenses the operating subsidiary as a means through which a national bank is authorized to conduct activities permissible for the bank itself. Under this regulation, "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority."[16]

The regulation further clarifies that in conducting permissible activities on behalf of its parent bank, the operating subsidiary is acting "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[17] When established in accordance with the procedures mandated by the OCC's Operating Subsidiary Rule and approved by the OCC, the operating subsidiary is a Federally-authorized means by which a national bank may conduct Federally-authorized activities.

e. Anti-predatory lending standards applicable to national banks

Recently, the OCC issued comprehensive supervisory standards to address predatory and abusive lending practices.[18] The OCC standards on predatory lending make clear that national banks should adopt – and vigorously adhere to – policies and procedures to prevent predatory lending practices in direct lending and in transactions involving brokered and purchased loans.

Significantly, AL 2003-2 provides that bank policies and procedures on direct lending should reflect the degree of care that is appropriate to the risk of a particular transaction. In

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[15] See 12 CFR 5.34(b).
[16] 12 CFR 5.34(e)(1).
[17] 12 CFR 5.34(e)(3).
[18] See OCC Advisory Letter 2003-2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (Feb. 21, 2003) (AL 2003-2) and OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (Feb. 21, 2003) (AL 2003-3).

some cases, this will entail making the determination that a loan is reasonably likely to meet the borrower's individual financial circumstances and needs. AL 2003-2 also emphasizes that if the OCC has evidence that a national bank has engaged in abusive lending practices, we will review those practices to determine whether they violate specific provisions of the Federal laws, including the Homeowners Equity Protection Act of 1994 (HOEPA), the Fair Housing Act, or the Equal Credit Opportunity Act. The OCC also will evaluate whether such practices involve unfair or deceptive practices in violation of the Federal Trade Commission Act (FTC Act). Indeed, several practices cited in AL 2003-2, such as equity stripping, loan flipping, and the re-financing of special subsidized mortgage loans that originally contained terms favorable to the borrower, can be found to be unfair practices that violate the FTC Act.

The OCC's second advisory, AL 2003-3, addresses concerns that have been raised about the link between predatory lending and non-regulated lending intermediaries, and the risk that a national bank could indirectly and inadvertently facilitate predatory lending through the purchase of loans and mortgage-backed securities and in connection with broker transactions. Pursuant to our standards, a national bank needs to perform adequate due diligence prior to entering into any relationships with loan brokers, third party loan originators, and the issuers of mortgage-backed securities, to ensure that the bank does not do business with companies that fail to employ appropriate safeguards against predatory lending in connection with loans they arrange, sell, or pool for securitization. AL 2003-3 also advises national banks to take specific steps to address the risk of fraud and deception in brokered loan transactions relating to broker-imposed fees and other broker compensation vehicles.

B. <u>National City's Preemption Request</u>

On January 29, 2003, National City submitted to the OCC a request for a determination or order under 12 U.S.C. 24(Seventh), 12 U.S.C. 371, 12 U.S.C. 85, and the OCC's implementing regulations, that the GFLA does not apply to National City.[19] National City originates and funds home equity loans and lines of credit on a nationwide basis. It also originates and funds first and second mortgage loans throughout the United States for the purpose of financing and refinancing the acquisition and construction of real property containing one to four family residential dwellings. National City receives loan applications from third party mortgage brokers, and those mortgage brokers perform many services resulting in the origination of the loans and lines of credit issued by National City.

In its request, National City asked the OCC to determine that 12 U.S.C. 24(Seventh) and 12 U.S.C. 371 preempt the GFLA with respect to the bank and its operating subsidiaries. National City asserts that the structure of section 371 and § 34.3, together with the express preemption delineated in § 34.4(a), evidence a presumption that state law does not apply to the real estate lending activities of national banks and their operating subsidiaries unless the OCC determines under § 34.4(b) that a particular state law is not preempted. In other words, in "considering whether state laws apply" for purposes of issuing an order under section 371, National City asserted that the OCC could either issue an order confirming that the law is not applicable or providing that it will be applicable after applying the "recognized principles of preemption" referred to in § 34.4(b). Thus, National City argued that section 371, in effect, authorizes the OCC to "occupy the field" of real estate lending regulation for national banks, and that, through its regulations, including § 34.4(a) and (b), the OCC has done so.

[19] Following the amendments to the GFLA, National City reaffirmed its interest in obtaining such a determination or order.

For purposes of determining whether any of the GFLA provisions not otherwise preempted under § 34.4(a) apply to National City, National City analyzed the degree to which the GFLA, in the words of Barnett, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[20] In this regard, National City asserted that various GFLA provisions place impermissible limits on the exercise of national banks' real estate lending powers under 12 U.S.C. 371.

In addition to its arguments under section 371 and the OCC's implementing regulations, National City asserts that the GFLA places impermissible limits on the exercise of national banks' authority to lend money generally under 12 U.S.C. 24(Seventh) and to charge fees for lending products or services pursuant to 12 CFR 7.4002.

Finally, National City contends that the GFLA has the effect of restricting its ability to use third party mortgage brokers and compensate them for the services they provide.

C. Notice of, and Comments on, National City's Request

On February 26, 2003, the OCC published for comment a Notice of National City's request (the Notice).[21] The OCC received 76 comments on the Notice. National banks, financial services providers, and trade associations submitted comments in support of the issuance of a preemption determination or order in this matter. Consumer organizations, state officials (including the Governor of Georgia and the Acting Commissioner of the Georgia Department of Banking and Finance), the Conference of State Bank Supervisors, the National Association of Attorneys General, certain members of the Committee on Financial Services of the United States House of Representatives, and one member of the Senate Committee on Banking, Housing, and Urban Affairs submitted comments in opposition.

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[20] Barnett, 517 U.S. at 31 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[21] 68 FR 8959 (Feb. 26, 2003).

As an initial matter, several commenters assert that National City's request is moot in light of the recent amendments to the GFLA. Others urged the OCC to rescind its notice until such time as it receives a revised request for preemption that reflects these amendments. Still others assert that, despite the amendments, the fundamental issues raised in National City's request remain unchanged.

We have reviewed the law as amended and, as discussed in greater detail below, conclude that the issue of whether Georgia may determine how national banks conduct real estate lending activities is not rendered moot, or fundamentally altered, by the changes adopted by the Georgia legislature. In addition, National City continues to assert that the GFLA remains impermissibly burdensome. Thus, we have proceeded with our consideration of National City's request.

National City's assertion that section 371 authorizes the OCC to "occupy the field" of national bank real estate lending generated considerable debate among the commenters over which preemption theory applies to National City's request. As explained further below, "occupation of the field" is one of the three ways in which Congress can preempt state law. In addition to field occupation, Congress can expressly provide in a Federal statute that the statute preempts state law or can adopt a statute that is in irreconcilable conflict with state law.[22]

Many commenters favoring preemption argue that the OCC should adopt an "occupation of the field" analysis. Those commenters assert that Congress's intent that Federal law would "occupy the field" of national bank real estate lending is evident in the express language of section 371, its legislative history, and other Federal statutes. Many of these commenters suggest, however, that the OCC apply, either as an addition or alternative to the "occupation of the field" analysis, a "conflicts" analysis under Barnett. These commenters assert that the GFLA

[22] See infra notes 40-45 and accompanying text.

conflicts with the Federal grant of power to a national bank to engage in real estate lending activities.

Opponents of preemption argue that the statute, its legislative history, and Federal case law provide no support for field preemption. Several of these commenters also cite the preamble of an earlier version of the OCC's regulations implementing section 371, in which the OCC stated that it was clarifying "the limited scope" of the regulation's preemption. Because they believe that field preemption theory is inapplicable here, the opposing commenters assert that the OCC should apply only a Barnett "conflicts" analysis to National City's request to determine the extent to which each provision of the GFLA interferes with the exercise of national banks' authority to engage in real estate lending. Under this analysis, the commenters argue that the GFLA does not prevent or significantly interfere with the exercise of national banks' real estate lending powers.

As discussed in detail below, our construction of section 371 and the results of a Barnett conflicts analysis of the GFLA provisions, both demonstrate that the GFLA places impermissible limits on national banks' real estate lending activities and, therefore, is preempted by Federal law. National City's request raises issues about only the laws in one state, however, and, in our view, is therefore not the appropriate vehicle to consider whether Federal law occupies the field of national bank real estate lending because that legal conclusion would have implications for other types of real estate lending laws and for real estate lending laws in all states. Accordingly, this Determination and Order does not address whether Federal law occupies the field of national banks' real estate lending activities. That issue will be considered, however, in a notice of proposed rulemaking that we are releasing simultaneously with this Determination and Order, to amend, among other parts of our rules, the rules in part 34 governing the applicability of state law to national banks' real estate lending activities.

In addition, the commenters debate the meaning of the considerable body of case law that has developed around the application of state law to the exercise of national banks powers. Commenters in favor of preemption note a long line of Supreme Court and lower Federal court precedent "interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."[23] Commenters opposed to preemption argue that the courts have avoided finding preemption in areas of law, such as consumer protection, traditionally occupied by the states. These commenters assert that Congress specifically endorsed this presumptive application of state laws to national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act).[24]

As discussed in greater detail below, the presumption against preemption of state law is inapplicable when the states attempt to regulate in an area, such as national banking, where there is a history of significant Federal presence.[25] Moreover, the Riegle-Neal Act applies the laws of the host state regarding community reinvestment, consumer protection, and fair lending to branches of an out-of-state national bank located in the host state only to the extent those laws are not otherwise preempted by Federal law.

Many of the comments concerned potential harm to consumers. Commenters opposed to preemption recite a host of abusive and predatory lending practices perpetrated against vulnerable borrowers, including minorities, the elderly, and the poor. These commenters believe

[23] Barnett, 517 U.S. at 32.
[24] Pub. L. 103-328, 108 Stat. 2338 (1994).

such practices demonstrate the necessity of state predatory lending laws such as the GFLA. Commenters supportive of preemption argue that Federal law already prohibits these types of practices and that multiple, and often conflicting, state and local predatory lending laws will raise the cost of consumer credit, limit access to credit for borrowers with impaired credit histories, and restrict banks' ability to develop and implement new products or product features and customize services to meet consumers' needs.

The OCC shares the view of the commenters that predatory and abusive lending practices are inconsistent with national objectives of encouraging home ownership and community revitalization, and can be devastating to individuals, families, and communities. This does not lead, however, to the conclusion suggested by some commenters that the OCC should have no objection to state predatory lending laws being made applicable to national banks.

First, laws such as the GFLA apply to loans with rates of interest and other features typical of risk-based pricing of subprime loans. These laws generally prohibit certain mortgage loan terms and impose extra compliance obligations when other loan terms and conditions are present. These laws introduce new standards for subprime lending that are untested, sometimes vague, often complex, and, in many cases, different from established and well-understood Federal requirements. They also create new potential liabilities and penalties for any lender that missteps in its efforts to comply with those new standards and restrictions. Thus, these laws materially increase a bank's costs and compliance risks in connection with subprime lending. Given the already generally higher credit risk of lending to subprime borrowers, bank lenders will conclude -- and have concluded -- that they simply are unable to effectively cover these increased costs and risks. Accordingly, they reduce their product offerings to avoid subprime

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[25] See Bank of America v. City & County of San Francisco, 309 F.3d 551, 559 (9th Cir. 2002); see also American Bankers Ass'n. v. Lockyer, 239 F. Supp. 2d 1000, 1016 (E.D. Cal., 2002); United States v. Locke, 529 U.S. 89, 108

mortgage lending, in order to concentrate on making loans for which they can receive acceptable compensation for the risks they undertake. The practical result of these laws, therefore, is to obstruct, or for practical purposes, prevent, national banks from making certain types of real estate loans, causing an overall reduction in credit available to subprime borrowers. This means that non-predatory, risk-priced credit will become more limited, or unavailable, to creditworthy subprime borrowers.[26]

Second, evidence that national banks are engaged in predatory lending practices is scant to non-existent. Based on the absence of such information – from third parties, our consumer complaint database, and our supervisory process – we have no reason to believe that national

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(2000).

[26] For a more detailed discussion of the reasons why anti-predatory lending laws may impede the flow of legitimate credit to homebuyers and for other economic analysis relevant to evaluating state anti-predatory lending laws, see Office of the Comptroller of the Currency, Global Banking and Financial Analysis Department, "OCC Working Paper: Economic Issues in Predatory Lending" (July 30, 2003) (OCC Paper).

As noted in the OCC Paper, a growing body of evidence indicates that state anti-predatory lending laws are likely to restrict the availability of credit to subprime borrowers. For example, studies of subprime lending activity in North Carolina before and after enactment of that state's anti-predatory lending law have shown a post-enactment decline in subprime mortgage originations of about 15%. See Keith Harvey & Peter Nigro, "Do Predatory Lending Laws Influence Mortgage Lending? An Analysis of the North Carolina Predatory Lending Law," Paper Presented at the Credit Research Conference on Subprime Lending, September 2002 (publication forthcoming in 2003 in a conference volume of the Journal of Real Estate Research); Gregory Elliehausen & Michael Staten, "Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law," Credit Research Center Working Paper #66, November 2002.

Other studies also have documented that an unfortunate and unintended consequence of legislation similar to the GFLA adopted in other jurisdictions has been the overall reduction in subprime loans being originated. See Robert E. Litan, "Unintended Consequences: The Risks of Premature State Regulation of Predatory Lending," available at http://www.aba.com/NR/rdonlyres/000070c7qvaumpweszqozjnk/PredReport20095.pdf, and studies discussed therein. One study also documented that the impact of this reduction was greater for minority and low-income applicants. See Keith Harvey & Peter Nigro, "How Do Predatory Lending Laws Influence Mortgage Lending in Urban Areas? A Tale of Two Cities," 26 J. Real Est. Res. No. 2 (forthcoming in 2003).

Some proponents of state anti-predatory lending laws have nonetheless argued that these laws inhibit predatory and abusive lending practices without reducing the availability of credit to subprime borrowers. A recently released study concludes that the North Carolina law worked, as intended, to reduce loans with predatory terms without a reduction in access to credit for high-risk borrowers. See Roberto G. Quercia, Michael A. Stegman, & Walter R. Davis, "The Impact of North Carolina's Anti-Predatory Lending Law: A Descriptive Assessment," Center for Community Capitalism, The Frank Hawkins Kenan Institute for Private Enterprise, University of North Carolina at Chapel Hill (June 25, 2003) (the Stegman Study), available at http://www.kenan-flagler.unc.edu/News/DetailsNewsPage.cfm?id=466&menu=ki. However, the data presented in this Study contain banks are engaged in such practices to any discernible degree. This observation is consistent with an extensive study of predatory lending conducted by HUD and the Treasury Department,[27] and with comments submitted in connection with an OTS rulemaking concerning preemption of state lending standards by 46 State Attorneys General.[28]

More recently, a coalition of State Attorneys General repeated the same view in a brief filed earlier this year in connection with a challenge to that OTS rulemaking. The case involves a revised regulation issued by the OTS to implement the Alternative Mortgage Transaction Parity Act (AMTPA). The revised regulation seeks to distinguish between federally supervised thrift institutions and non-bank mortgage lenders and makes non-bank mortgage lenders subject to state law restrictions on prepayment penalties and late fees. In supporting the OTS's decision to distinguish between supervised depository institutions and unsupervised housing creditors and to retain preemption of state laws with respect to the former, but not for the latter, the State Attorneys General stated:

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variables and uncertainties that may limit the Study's utility for evaluating the effects of state anti-predatory lending laws on the availability of credit to the full range of subprime borrowers. See OCC Paper.

[27] A Treasury-HUD joint report issued in 2000 found that predatory lending practices in the subprime market are less likely to occur in lending by –

> banks, thrifts, and credit unions that are subject to extensive oversight and regulation . . . . The subprime mortgage and finance companies that dominate mortgage lending in many low-income and minority communities, while subject to the same consumer protection laws, are not subject to as much federal oversight as their prime market counterparts – who are largely federally-supervised banks, thrifts, and credit unions. The absence of such accountability may create an environment where predatory practices flourish because they are unlikely to be detected.

Departments of Housing and Urban Development and the Treasury, "Curbing Predatory Home Mortgage Lending: A Joint Report" 17-18 (June 2000) (Treasury-HUD Joint Report), available at http://www.treas.gov/press/releases/report3076.htm.

In addition, the report found that a significant source of abusive lending practices is non-regulated mortgage brokers and similar intermediaries who, because they "do not actually take on the credit risk of making the loan, . . . may be less concerned about the loan's ultimate repayment, and more concerned with the fee income they earn from the transaction." Id. at 40.

[28] Cited in Nat'l Home Equity Mortgage Ass'n v. OTS, Civil Action No. 02-2506 (GK) (D.D.C. 2003) at 26.

> Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries.[29]

According to the State Attorneys General, "OTS looked to where the problems were and was well justified in addressing prepayment penalties and late fee regulation for state housing creditors only, not for supervised thrifts."[30] By not addressing supervised thrifts in its rule change, the OTS was retaining for those institutions preemption of state laws under its existing regulations. In practical effect, the State Attorneys General agreed that in matters of preemption, supervised depository institutions are distinguishable from other housing lenders, and did not take issue with OTS's preemption of state laws where the entity that benefits from the preemption is subject to substantial federal regulation and supervision, which effectively addresses the risk of abusive or predatory practices by those entities.

Against this background, the OCC's approach to predatory lending, embodied in the anti-predatory lending standards discussed above, implemented through the OCC's comprehensive supervision of national banks, minimizes the potential for harm from predatory or abusive lending without reducing the credit available to subprime borrowers. We recognize that certain loan terms and conditions are more likely to be used unfairly or abusively, but that does not mean that all risk-priced loans with those features are, necessarily, predatory. Thus, it is generally necessary to consider the totality of the circumstances to assess whether a loan is

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[29] Brief for Amicus Curiae State Attorneys General, Nat'l Home Equity Mortgage Ass'n, Civil Action No. 02-2506 (GK) (D.D.C.) at 10-11 (emphasis added).

predatory and likely to lead to practices such as equity stripping. The OCC's supervisory approach, implemented by trained examiners reviewing on-site the lending practices of national banks, allows for this type of consideration.[31] By focusing on lending practices rather than banning specific lending products, this approach reduces the likelihood of predatory lending rather than the availability of credit to subprime borrowers.

Numerous commenters also raised issues concerning the scope of the Determination or Order requested by National City and the appropriate procedure for the OCC to follow in responding to the request. Many of the commenters supporting preemption urge that the determination or order apply to all national banks, not just National City, and to their operating subsidiaries. These commenters note that national banks have long used separately incorporated entities to engage in activities that the bank itself is authorized to conduct and that courts have consistently treated the operating subsidiary and the national bank as equivalents. Thus, these commenters argue that the preemption order or determination requested by National City should apply to operating subsidiaries consistent with the OCC's regulations set forth at 12 CFR 7.4006 providing that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Commenters in favor of preemption who assume that the preemption order or determination would apply only to National City's activities in Georgia urge the OCC to issue a rule in conjunction with the determination or order that would apply to all national banks and

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[30] Id. at 11.

[31] Our supervisory track record also demonstrates that where we find abuse, or the potential for abuse, we will take strong action. See, e.g., In the Matter of Providian Nat'l Bank, Tilton, New Hampshire, Consent Order No. 2000-53 (June 28, 2000) (requiring payment by the bank in excess of $300 million and imposing numerous conditions on the conduct of future business), available at http://www.occ.treas.gov/ftp/release/2000%2D49b.pdf. This approach seems to be successful, as explained in the 2000 Treasury-HUD Joint Report, supra note 27.

national bank operating subsidiaries and conclude that all state and local predatory lending laws are preempted.

A number of the commenters opposed to preemption argue that the OCC's response to National City's request should be narrowly tailored and not apply to operating subsidiaries. These commenters believe that the OCC has no legal authority to preempt state laws insofar as they apply to operating subsidiaries of national banks because operating subsidiaries are chartered under state law and must therefore comply with all applicable state laws. One commenter also argues that the OCC may not take the position that § 7.4006 preempts the GFLA with respect to operating subsidiaries because the OCC did not comply with the Federalism requirements of Executive Order 13132 when it adopted the rule. This commenter also contends that if the OCC grants National City's request, it would create a "decisional rule" applicable to all national banks doing business in Georgia. As such, the commenter believes that Executive Order 13132 also would apply to this proceeding and the OCC should postpone any decision on National City's request until it satisfies its obligations under the Executive Order to consult with state officials.

We recognize that this preemption determination necessarily will affect the practices of lenders in Georgia in addition to National City. As discussed at length below, most of the GFLA provisions already are preempted by Federal law. Accordingly, those provisions are preempted for all national banks and their operating subsidiaries. For the remaining GFLA provisions preempted by operation of this determination and order, it would be incongruous for the law to preempt GFLA provisions for only one institution.[32] Therefore, this order will apply to all national banks engaged in real estate lending activities in Georgia.

[32] This determination depends on an analysis of the GFLA and national bank authority and is therefore not fact-specific to National City.

We also agree with the commenters who argued that, consistent with 12 CFR 7.4006, the GFLA is preempted for national bank operating subsidiaries to the same extent it is preempted for their parent banks.[33] Accordingly, this determination applies equally to national bank operating subsidiaries engaged in real estate lending activities in Georgia. This determination will not, however, affect lenders who are not otherwise subject to the GFLA. Therefore, we decline to adopt the suggestion of some commenters that this order apply to all national banks and national bank operating subsidiaries, regardless of whether they make real estate loans. Those lenders will, however, be subject to the results of the rulemaking commenced today, which proposes to apply the results of our analysis here by expanding the list of the types of state laws that are expressly preempted by Federal law concerning national banks' real estate lending powers.

These and other comments will be addressed in more detail in the following sections, which present an overview of the national banking laws and the Federal court precedents concerning the applicability of state law to national banks, followed by an analysis of the extent to which provisions of the GFLA are preempted by Federal law.

II. OVERVIEW OF FEDERAL PREEMPTION OF STATE LAWS WITH RESPECT TO NATIONAL BANKS

In the earliest decades of this country's existence, the Supreme Court recognized that under the Supremacy Clause of the U.S. Constitution -- paragraph 2 of Article VI -- states "have no power, by taxation or otherwise, to retard, impede, burden, or in any other manner control, the operations" of an entity created by lawful exercise of Federal authority.[34] The entity involved in the landmark case in which these principles were articulated was the Second Bank of the United

[33] See infra note 110 and accompanying text for a detailed discussion of the commenter's arguments concerning the Federalism order.

States. The history of the national banking laws and 140 years of Federal court precedents considering the applicability of state laws to national banks consistently reflect this principle and demonstrate that the exercise by a national bank of a Federally authorized power is ordinarily not subject to state law.

A. Legislative History of the Early National Banking Laws

Congress enacted the National Currency Act (Currency Act) in 1863 and modified it with the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of state banks. The Currency Act and National Bank Act were enacted to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the national economy both during and after the Civil War.

Both proponents and opponents of the new national banking system expected that it would supersede the existing system of state banks.[35] Given this anticipated impact on state banks and the resulting diminution of control by the states over banking in general,[36] proponents

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[34] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).

[35] Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law [i.e., the Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38th Cong. 1st Sess. 1256 (Mar. 23, 1864). While Rep. Hooper did not believe that the legislation was necessarily harmful to the state bank system, he did "look upon the system of State banks as having outlived its usefulness." Id. Opponents of the legislation believed that it was intended to "take from the States . . . all authority whatsoever over their own State banks, and to vest that authority . . . in Washington." Cong. Globe, 38th Cong., 1st Sess. 1267 (Mar. 24, 1864) (statement of Rep. Brooks). Rep. Brooks made that statement to support the idea that the legislation was intended to transfer control over banking from the states to the Federal government. Given the legislation's objective, its passage would, in Rep. Brooks' opinion, mean that there would be no state banks left over which the states would have authority. Thus, by observing that the legislation was intended to take authority over state banks from the states, Rep. Brooks was not suggesting that the Federal government would have authority over state banks; rather, he was explaining the bill in a context that assumed the demise of state banks. Rep. Pruyn opposed the bill stating that the legislation would "be the greatest blow yet inflicted upon the States." Cong. Globe, 38th Cong., 1st Sess. 1271 (Mar. 24, 1864). See also John Wilson Million, The Debate on the National Bank Act of 1863, 2 J. Pol. Econ. 251, 267 (1893-94) regarding the Currency Act ("Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks.").

[36] See, e.g., Tiffany v. Nat'l Bank of Missouri, 85 U.S. 409, 412-413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into

of the national banking system were concerned that states would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the [national] bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions."[37]

The allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference. Congress, accordingly, established a Federal supervisory regime and created a Federal agency within the Department of Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination of all the affairs of [a national bank],"[38] and solidified this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks. These provisions assure, among other things, that the OCC will have comprehensive authority to examine all the affairs of a national bank and protect national banks from potential state hostility by establishing that the authority to examine, supervise, and regulate national banks is vested only in the OCC, unless otherwise provided by Federal law.[39]

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competition with State banks, and it was intended to give them at least equal advantages in such competition . . . . National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."). See also B. Hammond, Banks and Politics in America from the Revolution to the Civil War 725-34 (1957); P. Studenski & H. Krooss, Financial History of the United States 155 (1st ed. 1952).

[37] Cong. Globe, 38th Cong., 1st Sess., at 1893 (Apr. 27, 1864). See also Beneficial Nat'l Bank, 123 S.Ct. at 2064 ("[T]his Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'") (citations omitted).

[38] Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

[39] Writing shortly after the Currency Act and National Bank Act were enacted, then-Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that "Congress has assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (Apr. 23, 1866).

B. The Supremacy Clause and the Federal Preemption Standards Articulated by the Supreme Court

In certain circumstances, a state law may be preempted by Federal law and thus rendered invalid by reason of the Supremacy Clause of the Constitution.[40] The Supreme Court has identified three ways in which Congress can displace state law. First, Congress can adopt express language setting forth the existence and scope of preemption.[41] Second, Congress can adopt a scheme of regulation that "occupies the field" and leaves no room for states to adopt supplemental laws.[42] Third, Congress can adopt a statute that is in "irreconcilable conflict" with state law.[43] Irreconcilable conflict will be found when either: (i) compliance with both laws is a "physical impossibility;"[44] or (as noted by National City in its request) (ii) when the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[45]

As noted above, many commenters pointed to the consumer protective nature of the GFLA in support of their position that preemption of the statute would be inappropriate. Because the origins of Federal preemption are Constitutional, however, the underlying purpose of the state legislation, albeit salutary, is not relevant to determining whether the law applies. As explained in Association of Banks in Insurance, Inc. v. Duryee,[46] "[w]here state and federal laws

[40] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.
[41] See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).
[42] See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[43] Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982).
[44] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).
[45] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Barnett, 517 U.S. at 31 (quoting Hines).
[46] 55 F. Supp. 2d 799 (S.D. Ohio 1999).

are inconsistent, the state law is pre-empted even if it was enacted by the state to protect its citizens or consumers."[47]

C. Supreme Court Precedents Leading to Barnett

From the earliest years of the national banking system, up to and including a decision rendered only months ago, the Supreme Court has consistently recognized the unique status of the national banking system and the limits placed on states by the National Bank Act.[48] The Supreme Court stated in one of the first cases to address the role of the national banking system that "[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."[49] Subsequent opinions of the Supreme Court have been equally clear about national banks' unique role and status.[50]

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of states over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in Easton v. Iowa,[51] the Court stated that Federal legislation affecting national banks—

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[47] Id. at 802. Agreeing with this conclusion, the Sixth Circuit stated that "the fact that the state legislature enacted the [state law at issue] to protect general insurance agents and consumers does not, for that reason alone, preclude federal preemption." Ass'n of Banks in Ins., Inc. v. Duryee, 270 F.3d 397, 408 (6th Cir. 2001); see also Franklin Nat'l Bank of Franklin Square v. New York, 347 U.S. 373, 378 (1954).
[48] See Beneficial Nat'l Bank, 123 S.Ct. at 2064.
[49] Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 33 (1875).
[50] See Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 299, 314-315 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that, . . . Congress intended to facilitate . . . a 'national banking system'.") (citation omitted); Franklin Nat'l Bank, 347 U.S. at 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories."); Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."); Guthrie v. Harkness, 199 U.S. 148, 159 (1905) ("It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation.").
[51] 188 U.S. 220 (1903).

has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States . . . . It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute . . . . [W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and <u>confusion would necessarily result from control possessed and exercised by two independent authorities</u>.[52]

The Court in <u>Farmers' & Mechanics' Bank</u>, after observing that national banks are means to aid the government, stated—

> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."[53]

Thus, as recognized by the Supreme Court in <u>Barnett</u>, the history of national bank powers is one of "interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state

[52] <u>Id</u>. at 229, 231-232 (emphasis added).
[53] <u>Farmers' & Mechanics' Bank</u>, 91 U.S. at 34 (citation omitted).

law."[54] "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."[55]

D. Recent Lower Federal Court Decisions Concluding that State Laws Are Preempted

This principle has been recognized and applied in a series of recent cases invalidating state and local restrictions upon national bank practices authorized under Federal law. In each case, the court determined that the state or local restriction obstructed, in whole or in part, the exercise of an authorized national bank power and therefore was preempted by operation of the Supremacy Clause.

For example, ordinances passed by four municipalities in California and New Jersey specifically to prohibit ATM access fees were promptly enjoined by district court order on grounds that included National Bank Act preemption. In California, the district court entered a preliminary injunction against the fee prohibition ordinances adopted by San Francisco and Santa Monica, and the Ninth Circuit affirmed. On remand, the district court entered a permanent injunction against the ordinances, and the Ninth Circuit once again affirmed.[56] Similarly, a Federal district court in New Jersey entered temporary restraining orders preventing fee prohibition ordinances adopted by Newark and Woodbridge from becoming effective. The combined case was ultimately settled by each city's consent to a permanent injunction against its ordinance.[57] A Federal district court in Des Moines declared a longstanding Iowa prohibition on ATM access fees to be in conflict with the national bank power to charge fees and therefore

[54] Barnett, 517 U.S. at 32. The Supreme Court has recognized that the "business of banking" is not limited to the powers enumerated in section 24(Seventh). NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995). As the scope of the underlying national bank power may evolve, the OCC "may authorize additional activities if encompassed by a reasonable interpretation of § 24(Seventh)." Indep. Ins. Agents of America, Inc. v. Hawke, 211 F.3d 638, 640 (D.C. Cir. 2000). Thus, the effect of a state law on the exercise of a Federal power may change as the character of the power changes.

[55] Barnett, 517 U.S. at 34.

[56] See Bank of America, N.A. v. City & County of San Francisco, 2000 WL 33376673 (N.D. Cal. June 30, 2000), aff'd, Bank of America, 309 F.3d 551.

preempted.[58] For similar reasons, the Fifth Circuit upheld a Federal district court ruling that Federal law displaced a Texas statute that prohibited the charging of fees for cashing checks drawn upon accounts at the payor bank.[59] A Federal district court in Georgia reached the same conclusion with respect to a Georgia law that similarly attempted to restrict the authority of national banks under Federal law to charge such fees.[60]

Restrictions on national bank activities other than the charging of fees have also been held preempted. Deferring to the OCC's interpretations of the National Bank Act, the Eighth Circuit held that Federal law preempted Iowa restrictions on ATM location, operation, and advertising as applied to national banks.[61] More recently, a Federal district court in California permanently enjoined the California Attorney General and Director of the Department of Consumer Affairs from enforcing a California statute requiring that certain language and information be placed on the billing statements credit card issuers provide their cardholders.[62] In so doing, the court held that there is "no indication in the NBA that Congress intended to subject that power [to loan money on personal security] to local restriction."[63] Thus, the court applied "the ordinary rule . . . of preemption of contrary state law."[64] Contrary state law may be preempted by Federal regulation. "Federal regulations have no less pre-emptive effect than federal statutes."[65]

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[57] See New Jersey Bankers Ass'n v. Township of Woodbridge, No. CV-00-702 (JAG) (D.N.J. Nov. 8, 2000).
[58] See Metrobank v. Foster, 193 F. Supp. 2d 1156 (S.D. Iowa 2002).
[59] See Wells Fargo Bank of Texas, N.A. v. James, 321 F.3d 488 (5th Cir. 2003).
[60] See Bank of America, N.A. v. Sorrell, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).
[61] See Bank One, Utah, v. Guttau, 190 F.3d 844 (8th Cir. 1999), cert. denied sub nom Foster v. Bank One, Utah, 529 U.S. 1087 (2000).
[62] See Lockyer, 239 F. Supp. 2d 1000.
[63] Id. at 1016; see also Wells Fargo Bank, N.A. v. Boutris, 252 F. Supp. 2d 1065, 1069 (E.D. Cal. 2003) ("The National Bank Act was enacted to 'facilitate . . . 'a national banking system,'' and 'to protect national banks against intrusive regulation by the States.'") (citations omitted).
[64] Lockyer, 239 F. Supp. 2d at 1016.
[65] Fid. Fed. Sav. & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 153 (1982).

E. The Limited Circumstances under which State Laws Apply to National Banks

State laws apply to national banks' activities under circumstances that have been described variously by the courts as not altering or conditioning a national bank's ability to exercise a power that Federal law grants to it.[66] "Thus, states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[67] Notably, these types of laws do not actually regulate the manner and content of the business of banking authorized for national banks under Federal law, but rather establish the legal infrastructure that surrounds and supports the conduct of that business. They promote a national bank's ability to conduct business; they do not obstruct a national bank's exercise of powers granted under Federal law.[68]

This does not mean, as asserted by some commenters, that state laws presumptively apply to national banks. These commenters suggest that all preemption analysis begins with the presumption against preemption. As explained recently by the Court, however, this presumption is "not triggered when the States regulate in an area where there has been a history of significant federal presence."[69] As further explained by the Ninth Circuit in Bank of America, "because there has been a 'history of significant federal presence' in national banking, the presumption against preemption of state law is inapplicable."[70]

Nor, contrary to these commenters' assertions, did Congress specifically endorse the presumptive application of state laws in the Riegle-Neal Act. Although the Riegle-Neal Act, at 12 U.S.C. 36(f)(1)(A), initially makes applicable the laws of the host state regarding community

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[66] See Barnett, 517 U.S. at 33.
[67] Bank of America, 309 F.3d at 559. Notably, "[c]onsumer protection is not reflected in the case law as an area in which the states have traditionally been permitted to regulate national banks." Lockyer, 239 F. Supp. 2d at 1016.
[68] See Barnett, 517 U.S. at 15, 33-34, and cases cited therein.
[69] United States v. Locke, 529 U.S. at 108.
[70] 309 F.3d at 559.

reinvestment, consumer protection, and fair lending to branches of an out-of-state national bank located in the host state, the statute expressly excepts any state laws that are preempted under Federal law. In a few situations, Federal law has incorporated provisions of state law for specific purposes.[71] Congress may more generally establish standards that govern when state law will apply to national banks' activities.[72] In such cases, the OCC applies the law or the standards that Congress has required or established.

III. DISCUSSION AND ANALYSIS

The GFLA affects a national bank's ability to engage in real estate lending, the rate of interest a national bank may charge for a loan, and a national bank's ability to charge non-interest fees. Our discussion analyzes the provisions of the GFLA according to these categories. Following that analysis, we discuss the extent to which Federal law preempts the remaining provisions. We first review the provisions of the GFLA as they apply to a national bank, then apply those conclusions to the bank's operating subsidiaries.

A. The GFLA Conflicts with the Federal Grant of Power to a National Bank to Engage in Real Estate Lending Activities

In Barnett, the Supreme Court analyzed a statute, 12 U.S.C. 92, similar in structure to section 371, to determine the extent to which section 92 leaves room for state regulation of the activities the statute authorizes. There, the Supreme Court stated that:

> [section 92's] language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks "may . . . act as the agent" for insurance sales. 12 U.S.C. § 92. It specifically refers to "rules and

[71] See, e.g., 12 U.S.C. 92a(a) (the extent of a national bank's fiduciary powers is determined by reference to the law of the state where the national bank is located).

regulations" that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency.[73]

The Court concluded that "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies."[74]

Section 371 authorizes national banks to engage in real estate lending "subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." This express language specifically addresses the sources of restrictions on national banks' real estate lending activities and, by its terms, does not envision that the exercise of those powers, granted by section 371, would be subject to compliance with any state requirement.[75]

The legislative history of section 371 lends further support to this construction. National banks' real estate lending activities have consistently been subject to comprehensive Federal regulation ever since the authority to lend on the security of real estate was first granted to them in the Federal Reserve Act of 1913. For many years, national banks' real estate lending authority was governed by the express terms of section 371. As originally enacted in 1913, section 371 contained a limited grant of authority to national banks to lend on the security of "improved and

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[72] See, e.g., 15 U.S.C. 6701 (codification of section 104 of the GLBA, Pub. L. 106-102, 113 Stat. 1338, 1352 (1999), which establishes standards for determining the applicability of state law to different types of activities conducted by national banks, other insured depository institutions, and their affiliates).
[73] Barnett, 517 U.S. at 32.
[74] Id. at 34.
[75] One commenter argued that this construction of national banks' real estate lending authority is refuted by the 1896 case of McClellan v. Chipman, 164 U.S. 347 (1896). In that case, a national bank unsuccessfully asserted that the statute then applicable to national banks' real estate lending activities left no room for the application of a state insolvency law. The state insolvency law at issue in McClellan is easily distinguished from the GFLA, however. The Supreme Court recognized two propositions in McClellan. First, "general state laws upon the dealings and contracts of national banks" apply to the banks' operations. Id. at 357. Second, there is an exception to this general rule for state laws that "expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." Id. The Supreme Court held that the state insolvency law at issue in McClellan was the type of law governed by the first proposition. The GFLA is not a general state contract law that only incidentally impacts

unencumbered farm land, situated within its Federal reserve district."[76] In addition to the geographic limits inherent in this authorization, the Federal Reserve Act also imposed limits on the term and amount of each loan as well as an aggregate lending limit. Over the years, section 371 was repeatedly amended to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits.

In 1982, Congress removed these "rigid statutory limitations"[77] in favor of a broad provision authorizing national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation."[78] The purpose of the 1982 amendment was "to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market."[79] In 1991, Congress removed the term "rule" from this phrase and enacted an additional requirement, codified at 12 U.S.C. 1828(o), that national banks (and other insured depository institutions) conduct real estate lending pursuant to uniform standards adopted at the Federal level by regulations of the OCC and the other Federal banking agencies.[80] The two versions of section 371 – namely, the lengthy and prescriptive approach prior to 1982 and the more recent statement of broad authority qualified only by reference to Federal law – may be seen as evolving articulations of the same idea.

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national banks' real estate lending activities, however. Because the GFLA directly regulates the real estate lending of national banks, it is inapplicable to national banks pursuant to the second proposition recognized in McClellan.

[76] Federal Reserve Act, ch. 6, § 24, 38 Stat. 251, 273 (1913).

[77] S. Rep. No. 97-536, at 27 (1982).

[78] Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 403, 96 Stat. 1469, 1510-11 (1982).

[79] S. Rep. No. 97-536, at 27 (1982).

[80] See section 304 of the Federal Deposit Insurance Corporation Improvement Act, codified at 12 U.S.C. 1828(o). These standards governing national banks' real estate lending are set forth in Subpart D of part 34.

In no respect does the statute express or imply that the power granted is limited, to some variable degree, by application of fifty different state laws. Part 34 of our rules, which was issued pursuant to the OCC's authority under section 371, already identifies certain types of state laws that do not apply to national banks. Section 34.4(a) expressly preempts state laws concerning five areas of fixed-rate mortgage lending. Section 34.4(b) provides that, when considering whether to preempt state laws in other areas of mortgage lending, the OCC will apply recognized principles of Federal preemption.

We analyze first the provisions of the GFLA that are preempted under § 34.4(a). Two of the five types of state laws expressly preempted by § 34.4(a) -- state laws concerning the schedule for the repayment of principal and interest (§ 34.4(a)(2)) and the term to maturity of the loan (§ 34.4(a)(3)) -- are relevant here. Following our analysis of the GFLA provisions preempted by §§ 34.4(a)(2) and (3), we analyze GFLA provisions preempted under recognized principles of Federal preemption as provided by § 34.4(b).[81]

1. <u>Provisions of GFLA preempted by § 34.4(a)(2) (State laws concerning the schedule for repayment of principal and interest)</u>

Section 34.4(a)(2) preempts state laws "concerning . . . [t]he schedule for the repayment of principal and interest." The inherent and inseparable elements of any repayment schedule are: (1) the timing of the expected payments; and (2) the amount of the expected payments. The following six provisions of the GFLA concern one or both of these elements and are therefore preempted pursuant to § 34.4(a)(2):

- <u>Balloon payments</u>. Under the GFLA, no scheduled payment on a high-cost home loan may be more than twice as much as the average of earlier scheduled payments, except where payment schedules are adjusted to the seasonal or irregular income of a borrower. A limitation on the ability to offer balloon loans limits the ability of the lender and the borrower to agree on a repayment schedule that would permit lower principal payments initially.

- Negative amortization. The GFLA prohibits a high-cost home loan from including payment terms under which the principal balance increases because regular periodic payments fail to pay interest due. A prohibition on negative amortization limits the ability of the lender and borrower to agree on terms for the repayment and schedule of payment of principal and interest.[82]

- Advance payments. The GFLA provides that a high-cost home loan contract may not include a payment schedule that consolidates more than two periodic payments and pays them in advance from loan proceeds. This provision is an express limitation on a lender's and borrower's ability to agree to a schedule for the repayment of principal and interest.

- Late fees. Under the GFLA, a creditor or servicer may not assess a late payment fee on a home loan unless the loan document specifically authorizes the fee, the payment is at least ten days late, and the fee does not exceed 5% of the amount of the late payment. Late fees may be imposed only once for each late payment. If a late fee is deducted from a payment and causes a default on a subsequent payment, no late fee may be imposed for such default. A lender may apply any payment made in order of maturity to a prior period's payment due even if it results in late payment charges accruing on subsequent payments due. Late fees are considered

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[81] Although National City's request does not raise issues under Federal law governing adjustable rate mortgage lending, we note that Subpart B of part 34 states as a general rule that national banks may engage in ARM lending without regard to any state law limitation. See 12 CFR 34.21(a).

[82] In other contexts, however, failure to disclose the existence of a negative amortization feature may be an unfair or deceptive practice. See, e.g., OCC, "Interagency Account Management and Loss Allowance Guidance" (Jan. 8, 2003), available at http://www.OCC.Treas.Gov./ftp/bulletin/2003-1a.pdf.

"interest" under the OCC's regulations at 12 CFR 7.4001(a).[83] The GFLA limitation on this form of interest is an impermissible state law concerning the schedule for repayment of interest and principal under § 34.4(a)(2). A limitation on late fees limits the ability of a lender and a borrower to agree to terms allowing for the imposition of increased interest charges if the borrower fails to adhere to the agreed-upon repayment schedule.

- Prepayment fees. Prepayment fees on a high-cost home loan under the GFLA are limited to 2% of the amount prepaid in first year of loan; 1% of the amount prepaid in second year of loan; and zero thereafter. Like late fees, prepayment fees, when imposed in connection with non-ARM loans, are considered "interest."[84] A limitation on prepayment fees limits the ability of a lender and a borrower to agree to terms allowing for alteration of the timing and amount of expected payments.

- Default rates of interest. The GFLA prohibits increasing the interest rate charged after default on a high-cost home loan unless the rate is changed due to a variable-rate feature in the loan. This provision limits the ability of a borrower and lender to agree to loan terms permitting the imposition of increased interest charges if the borrower fails to adhere to the agreed-upon repayment schedule.

Each provision of the GFLA summarized above concerns the schedule for repayment of principle and interest. Accordingly, each is preempted by § 34.4(a)(2).

2. Provisions of GFLA preempted by § 34.4(a)(3) (State laws concerning term to maturity)

[83] For this reason, the GFLA limits on late fees are also analyzed below under 12 U.S.C. 85, and are preempted under that provision for national banks not located in Georgia that make loans secured by property located in Georgia.
[84] See OCC Interpretive Letter No. 803 (Oct. 7, 1997). For this reason, the GFLA limits on prepayment fees are also analyzed below under 12 U.S.C. 85 and, like limits on late fees, are preempted under that provision for national banks not located in Georgia that make loans secured by property located in Georgia.

The following three provisions of the GFLA concern the term to maturity of a real estate loan and, as such, are preempted by § 34.4(a)(3):

- Prepayment fees limited. As described above, the GFLA limits prepayment fees on a high-cost loan to 2% of the amount prepaid in first year of loan; 1% of the amount prepaid in second year of loan; and zero thereafter. In addition to establishing impermissible restrictions on a national bank's authority to establish the schedule for repayment of interest and principal under § 34.4(a)(2), this provision also frustrates the ability of a national bank to structure the maturity of loans it originates by prohibiting the use of incentives designed to achieve the desired maturities.

- Acceleration in absence of default prohibited. Under the GFLA, a high-cost loan agreement may not contain a provision that permits a creditor or servicer, in its sole discretion, to accelerate the indebtedness unless there is a bona fide default by borrower. A limitation on the ability to accelerate the indebtedness in situations where there is no default but the borrower's creditworthiness may have significantly deteriorated limits the ability of a lender and a borrower to agree to terms that would alter the term to maturity of a loan.

- Right to "cure" a default. If a high-cost home loan is accelerated, the GFLA gives the borrower the right to "cure" the default at any point up to foreclosure. Cure of default reinstates the borrower to the same position as if the default had not occurred and nullifies the acceleration. This provision thus requires the original term of the loan to be reinstated upon curing a default, notwithstanding the possibility that prudent underwriting would suggest a modification of terms (including maturity).

3. GFLA provisions preempted under recognized principles of preemption as provided by § 34.4(b)

Section 34.4(a) is not a comprehensive list of all of the types of state real estate lending laws that are inapplicable to national banks. Section 34.4(b) acknowledges that the OCC evaluates additional types of state laws on a case-by-case basis. It says:

> The OCC will apply recognized principles of Federal preemption in considering whether State laws apply to other aspects of real estate lending by national banks.[85]

The "recognized principles of Federal preemption" derive from the substantial body of Federal precedent considering the applicability of state law to the exercise of national bank powers. Courts and the OCC have consistently held that states may not condition the exercise of permissible Federal powers upon the approval of the states.[86]

Consistent with these precedents, we conclude that the following provisions of the GFLA are preempted. Even though based on laudable motives, they impermissibly seek to impose requirements that a national bank would have to satisfy before being permitted to exercise powers authorized under Federal law.

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[85] 12 CFR 34.4(b). The OCC proposed to add this provision to part 34 in 1995. At that time, we explained that the purpose of § 34.4(b) was to "clarify that the list of areas [set forth currently in § 34.4(a)] where State law is preempted . . . is not exhaustive." 60 FR 35353, 35355 (July 7, 1995)(emphasis added.) The final rule adopted the proposed rule with only minor stylistic edits. See 61 FR 11294, 11296 (Mar. 20, 1996). This rulemaking superseded a 1983 revision to part 34, in which the OCC stated that we were clarifying a "limited scope of preemption" by preempting "at this time, only those state laws that govern in those areas" now encompassed in § 34.4(a). 48 FR 40698, 40700 (Sept. 9, 1983)(emphasis added.) Thus, the 1983 rulemaking left room for an expanded preemptive scope in the future and has been superseded by the present text of § 34.4.

[86] See, e.g., Barnett, 517 U.S. at 34-35; Franklin Nat'l Bank, 347 U.S. at 378; Bank of America Nat'l Trust & Sav. Ass'n v. Lima, 103 F. Supp. 916, 918, 920 (D. Mass. 1952) (exercise of national bank powers is not subject to state approval; states have no authority to require national banks to obtain a license to engage in an activity permitted to them by Federal law). See also Letter dated Mar. 7, 2000, from Julie L. Williams to Thomas P. Vartanian, 65 FR 15037 (Mar. 20, 2000) (Federal law would preempt state statute regulating the conduct of auctions if applied to a national bank's online auction program); OCC Interpretive Letter No. 866 (Oct. 8, 1999) (state law requirements that purport to preclude national banks from soliciting trust business from customers located in states other than where the bank's main office is located would be preempted); OCC Interpretive Letter No. 749 (Sept. 13, 1996) (state law requiring national banks to be licensed by the state to sell annuities would be preempted); OCC Interpretive Letter No. 644 (Mar. 24, 1994) (state registration and fee requirements imposed on mortgage lenders would be preempted).

- Restriction on financing of credit insurance and debt suspension and debt cancellation fees. A creditor of a home loan may not finance credit insurance premiums, debt suspension fees, debt cancellation fees,[87] or certain other premiums. Premiums or fees paid for certain types of insurance on a monthly basis are permitted.[88]

- Restriction on refinancings. Creditors may not knowingly or intentionally refinance a home loan in a transaction defined under the GFLA as "flipping." "Flipping" occurs when (a) a creditor makes a high-cost home loan to a borrower that refinances an existing home loan that was consummated within the prior five years, and (b) the new loan does not provide a reasonable and tangible net benefit to the borrower considering all of the circumstances. "Flipping" will be presumed to have occurred if the loan refinances a home loan that was: (a) consummated within the past five years; (b) a special mortgage originated, subsidized, or guaranteed by a state, tribal, or local government or nonprofit organization; and (c) originated at a below-market interest rate or with nonstandard terms beneficial to the borrower. The refinance of a loan originated or purchased by the Georgia Housing and Finance Agency (GHFA) will be presumed not to have been flipped.

- Borrower counseling required. A creditor may not make a high-cost home loan unless it receives a certificate from a counselor approved by HUD or the GFHA that the borrower has received counseling on the advisability of the loan transaction.

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[87] OCC regulations at 12 CFR part 37 already prohibit contract terms that require a lump sum, single payment for a debt cancellation contract or debt suspension agreement where the debt subject to the contract is a residential real estate loan. See 12 CFR 37.3(c)(2). Part 37 applies to debt cancellation contracts and debt suspension agreements entered into by national banks in connection with extensions of credit they make and provides that those contracts and agreements are not governed by state law. See id. § 37.1(c).

[88] When insurance is financed as part of a home loan, the GFLA restricts the options available to the lender and borrower concerning how the loan proceeds are to be applied. This has the effect of imposing a condition on real estate lending in violation of section 371. The applicability of state laws regarding credit insurance sales, solicitation, and cross-marketing is governed by section 104 of the GLBA. See 15 U.S.C. 6701. The National City request raises no issues pertaining to the preemption of such state laws.

- <u>Underwriting standards limited</u>. A creditor may not make a high-cost home loan unless a reasonable creditor would believe at the time the loan is consummated that the borrower can make scheduled payments based on income, obligations, employment status, and other financial resources. There is a rebuttable presumption that a borrower can make scheduled payments if total debt service does not exceed 50% of gross monthly income.

- <u>Restrictions on home improvement loans</u>. A creditor or servicer may not pay a contractor under a home improvement contract from proceeds of a high-cost home loan unless (a) the lender or servicer receives an affidavit from the contractor that work has been completed, and (b) the loan proceeds are disbursed in an instrument payable either to the borrower alone, to the borrower and the contractor, or to a third-party escrow agent.

- <u>Notice requirements</u>. A creditor of a high-cost home loan must comply with the GFLA's notice requirements for originating and foreclosing high-cost home loans. Under these requirements, a creditor must provide a borrower certain notices in the documents that create a debt or pledge collateral and before initiating foreclosure proceedings.

We note, however, that although the foregoing provisions are inapplicable to national banks and their operating subsidiaries, the concerns underlying those provisions are addressed through the OCC's supervision of national banks and their subsidiaries. As mentioned above, the OCC recently issued Advisory Letters 2003-2 and 2003-3, which contain the most comprehensive supervisory standards ever published by any Federal financial regulatory agency to address predatory and abusive lending practices and detail steps for national banks to take to ensure that they do not engage in such practices. As explained in the Advisory Letters, if the OCC has evidence that a national bank has engaged in abusive lending practices, we will review those practices not only to determine whether they violate specific provisions of law such as

HOEPA, the Fair Housing Act, or the Equal Credit Opportunity Act, but also to determine whether they involve unfair or deceptive practices that violate the FTC Act. Indeed, several practices that we identify as abusive in our Advisory Letters -- such as equity stripping, loan flipping, and the refinancing of special subsidized mortgage loans that originally contained terms favorable to the borrower -- generally can be found to be unfair practices that violate the FTC Act. Moreover, our enforcement record amply demonstrates the OCC's commitment to using the FTC Act to address consumer abuses that are not specifically prohibited by regulation.[89]

Finally, the following provisions of the GFLA impermissibly impose restrictions on, and interfere with, the exercise of the Federal power of national banks to make real estate loans and accordingly are preempted:

- Discouraging use of ADR prohibited. "[A]ny provision of a high-cost loan that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in this state where the borrower may otherwise properly bring the claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void."

- No encouraging borrower to default. In connection with a home loan or high-cost home loan, "[n]o creditor or servicer shall recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a home loan that refinances all or any portion of such existing loan or debt."

- Assignee liability. A purchaser of a high-cost home loan is subject to all claims and defenses that the borrower could assert against the lender, unless the purchaser shows that it exercised reasonable due diligence to prevent the purchase of a high-cost home loan.

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[89] Since the Providian settlement in 2000, see supra note 31, the OCC has taken action under the FTC Act to address unfair or deceptive practices and consumer harm involving five other national banks. These orders can be found at

- <u>Assignment of contractor liability</u>. Under the GFLA, where a home loan was "made, arranged, or assigned by a person selling home improvements to the dwelling of a borrower, the borrower may assert against the creditor all affirmative claims and defenses that the borrower may have against the seller or home improvement contractor." This provision applies to high-cost home loans and home loans where applicable law requires a certificate of occupancy, inspection, or completion to be obtained and the certificate was not obtained.

Each of these provisions adds a special restriction to the making of real estate loans in Georgia. Unlike state laws that provide the legal infrastructure needed for real property conveyances generally, the GFLA provisions single out a subset of real estate transactions authorized by section 371 and our part 34 for additional regulation. They introduce new standards for a category of subprime loans that are untested, vague, and different from well-understood Federal requirements. They also create new potential liabilities and penalties for any lender that missteps in its efforts to comply with the new standards and restrictions. Thus, they materially increase a bank's costs and compliance risks in connection with an entire category of subprime lending. Given the already generally higher credit risk of lending to subprime borrowers, bank lenders are simply unable to effectively cover these increased costs and risks.

For example, the standards of the alternative dispute provision – "less convenient, more costly, or more dilatory"-- are vague and not susceptible of certainty before an action is filed. Similarly, while a lender may not intend to "recommend or encourage" conduct that would fit within the GFLA prohibition on encouraging a borrower to default, an argument by a borrower that the lender did so may be difficult to disprove, given the imprecise nature of those words. Moreover, the assignment of contractor liability provision requires the impossible – namely, that a creditor ascertain and manage all potential legal risks generated by third party contractors

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http://www.occ.treas.gov/foia/foiadocs.htm.

notwithstanding that the contractors act independently and beyond the lender's control. Where a bank cannot ascertain precisely what is necessary to comply with a statute, on pain of potential civil liability imposed on both the bank and assignees of loans originated by the bank, that uncertainty in itself imposes costs weighing upon national banks' ability to conduct real estate lending operations in Georgia.[90]

These costs and uncertainties have been amply publicized in the months since the GFLA was enacted, particularly in connection with the assignee liability provision. As mentioned above, following the enactment of the original GFLA, Moody's Investors Service and Standard and Poor's took the unusual step of announcing that including GFLA-covered loans in securitizations was too risky, causing lenders to scale back loans in the state and leading issuers to remove Georgia loans from securitizations. The recent amendments to the GFLA capped the originally unlimited liability imposed on assignees of GFLA loans, but did not entirely remove the threat of liability, which continues to create substantial uncertainty in the secondary market. For example, Standard and Poor's has announced that it "may consider" rating transactions that include GFLA "high-cost" loans.[91] Moody's Investors Service recently indicated that loans subject to predatory lending laws may be included in residential mortgage-backed securitizations only if seven conditions are satisfied.[92] In addition, GFLA high-cost home loans remain

[90] The OCC made a similar argument recently in connection with a California statute requiring creditors to provide minimum payments warnings on credit card billing statements. In granting a permanent injunction against enforcement of the state statute, a federal district court found "the OCC's interpretation of the preemptive effect of the NBA on [the state law] to be reasonable." Lockyer, 239 F. Supp. 2d at 1014.

[91] For such transactions, the criteria will be stringent. Standard and Poor's will require lenders to identify which loans are "high-cost" and which of those loans are predatory, and prevent their transfer into the securitization. Natalie Abrams, Esq., "Evaluating Predatory Lending Laws: Standard & Poor's Explains its Approach" (Apr. 15, 2003), available at http://www.standardandpoors.com. By putting the onus on the lender to identify which loans are predatory, many banks may simply decline to make any "high-cost" home loans to avoid exposure. Indeed, several studies have documented that an unfortunate and unintended consequence of legislation similar to the GFLA adopted in other jurisdictions has been the overall reduction in subprime loans being originated. See supra note 26 and studies discussed therein.

[92] "Moody's Investors Service Special Report: Impact of Predatory Lending Laws on RMBS Securitizations" (May 6, 2003). Among these seven conditions is that the "statute must be sufficiently clear so that the lender can

ineligible for purchase by Freddie Mac and Fannie Mae.[93] Without a reliable secondary market for these loans, banks will be required to hold more of these loans to maturity. This, in turn, ties up more of a bank's resources, requiring it to hold capital against the full amount of these loans, and thus adversely affects the ability of the bank to originate or acquire other real estate loans. As such, the assignee liability provision of the GFLA, if the rest of the GFLA's provisions were applicable to national banks notwithstanding the conclusions reached in this Determination and Order, would stand as an obstacle to the exercise of national banks' real estate lending powers, including the power to sell real estate loans into the secondary market or to securitize these loans.

Under Franklin, Barnett, and other Federal cases, a conflict between a state law and Federal law need not amount to a whole, or even partial, prohibition in order for the Federal law to have preemptive effect.[94] Where a Federal grant of authority is unrestricted, state law that attempts to obstruct the scope and effective exercise by a national bank of its express or incidental powers will be preempted.[95] Moreover, as noted in Lockyer, the degree of state interference or intrusion need not be notably high to warrant a conclusion that a state law is preempted.

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effectively comply." Id. at 5. The Moody's Report does not specifically address the GFLA but gives as an example of insufficiently clear statutory language a provision, such as the GFLA provision on "flipping," that requires a lender to only make loans for which there is a "tangible net benefit" to the borrower. The Moody's Report notes that until such time that a regulation or court decision provides clear guidelines of what constitutes "tangible net benefit," "it may be impossible for a lender to demonstrate compliance." Id. at 3.

[93] See Fannie Mae Announcement 03-02, "Purchase of Georgia and New York 'High Cost Home Loans'" (Mar. 31, 2002); see also Freddie Mac Industry Letter, "Revisions to Freddie Mac's mortgage purchase requirements based on Section 6-L of the New York State Banking Law and amendments to the Georgia Fair Lending Act" (Mar. 31, 2003), available at http://www.freddiemac.com/sell/selbultn/0331indltr.html.

[94] See Barnett, 517 U.S. at 31-32.

[95] See, e.g., Franklin Nat'l Bank, 347 U.S. at 378; Duryee, 270 F.3d at 409 ("The intervenors' attempt to redefine 'significantly interfere' as 'effectively thwart' is unpersuasive."); New York Bankers Ass'n, Inc. v. Levin, 999 F. Supp. 716, 719 (W.D.N.Y. 1998) (holding that a New York statute that restricted the types of insurance banks could sell to their customers was preempted on the grounds that the state law "constitutes an interference with [banks'] rights" to sell insurance).

B. The GFLA Provisions Limiting the Rate of Interest a National Bank Charges Are Inapplicable to National Banks Pursuant to 12 U.S.C. 85 and 12 CFR 7.4001

As we have described, under 12 U.S.C. 85, a national bank is authorized to charge interest according to the most favored lender rate permitted by the laws of the state in which the bank is located. OCC regulations at 12 CFR 7.4001 provide that a national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. This "most favored lender" status permits a national bank to contract with borrowers in any state for interest at the maximum rate permitted by the law of the state in which the national bank is located. As discussed below, for a bank, such as National City, which is not located in Georgia for purposes of section 85 and 7.4001, this means that its permissible rates of interest are not tied to Georgia law, but instead are determined by reference to the most favored lender rates in the state where the bank is located. Applying this rule to National City, any limits on interest imposed by Georgia are preempted by section 85 and 7.4001. For a national bank that is located in Georgia for this purpose, the limits on rates set by the GFLA are simply inapplicable, for the reasons explained below.

Pursuant to the recent amendments to the GFLA and the OTS determination that the GFLA is preempted for Federal thrifts, state-chartered savings associations are the most favored lenders in Georgia for purposes of national banks that apply Georgia rates of interest under section 85. As mentioned above, the recent amendments to the GFLA created preemption parity for state-chartered institutions if "federal law . . . preempts or has been determined to . . . preempt the application of the provisions of [the GFLA]" to their Federally-chartered counterparts. The OTS concluded that, because it occupied the field of regulation for lending activities of Federal savings associations, the GFLA provisions that purport to regulate the terms of credit, loan-related fees, disclosures, or the ability of a creditor to originate or refinance a loan, do "not apply to Federal savings associations' home lending."[96] As a result, the GFLA provisions that limit the rate of interest a lender may charge a borrower – those limiting late fees, prepayment fees for non-ARM loans, and default rate of interest – do not apply to state-chartered thrifts. By operation of section 85, these limits also would not apply to national banks located in Georgia because such banks are permitted to charge the maximum rates permitted to these "most favored lenders."[97]

C. <u>The GFLA Conflicts with the Federal Grant of Power to National Banks to Charge Non-Interest Fees</u>

As described above, section 24(Seventh) authorizes national banks to engage in activities that are part of, or incidental to, the business of banking as well as to engage in certain specified activities listed in the statute. Mortgage lending is expressly authorized for national banks and therefore part of the business of banking. Moreover, a bank's authority to provide the products or services authorized by section 24(Seventh) to its customers necessarily encompasses the ability to charge a fee for the product or service.[98] The authority to charge fees for the bank's services is expressly set out in the OCC's regulations at 12 CFR 7.4002(a).

Three provisions of the GFLA restrict or prohibit a creditor or servicer from imposing various non-interest fees for its products and services:

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[96] OTS Op. Chief Counsel, <u>supra</u> note 5, at 3.

[97] We note that Federal thrifts have most favored lender authority under a statute (12 U.S.C. 1463(g)) and regulation (12 CFR 560.110) that are identical to section 85 and § 7.4001 in all material respects. It is not clear that the OTS opinion addressed preemption issues raised by the GFLA by applying section 1463(g) and § 560.110 since the thrift requesting the OTS opinion appeared not to be located in Georgia. The OTS appears instead to have based its preemption analysis solely on the OTS's occupation of the entire field of lending. To the extent that (a) that theory supercedes specific standards in sections 1463(g) and 560.110, and (b) Federal thrifts are thus free to set interest either pursuant to the most favored lender rule set out in § 560.110 or pursuant to the maximum rate permitted in light of the preemption rule set out in § 560.2, national banks in Georgia would similarly be free to set interest under either part 34 or § 7.4001.

[98] <u>See supra</u> note 13 and accompanying text.

- Prohibition on payoff balance and release fees. Under the GFLA, a creditor or servicer may not charge a fee to inform a person of the payoff balance or to provide a release upon prepayment of a home loan. Payoff balances must be provided within five business days of a request. A processing fee of up to $10 may be charged if information is provided by fax or if provided within 60 days of a previous request.

- Prohibition on certain other fees. The GFLA prohibits a creditor or servicer from charging a borrower any fee to modify, renew, extend, or amend a high-cost home loan or to defer any payment due.

- Right to "cure" a default. A borrower may not be charged a fee attributable to curing a default of a high-cost home loan unless the fee is otherwise authorized by the GFLA.

These provisions conflict with well-established statutory and regulatory authority permitting national banks to charge such fees. As explained above, section 24(Seventh) authorizes a national bank to engage in activities that are part of, or incidental to, the business of banking as well as to engage in certain specified activities listed in the statute. A bank's authority to provide these services to its customers necessarily encompasses the ability to charge a fee for them, and this ability to charge a fee for the bank's services is expressly affirmed in 12 CFR 7.4002(a).[99]

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[99] We note that a fee to defer a payment due is, in substance, a debt suspension agreement subject to 12 CFR part 37, which expressly occupies the field in this area and imposes uniform, nationally applicable safeguards on national banks offering this product. Part 37 states:

> This part applies to debt cancellation contracts and debt suspension agreements entered into by national banks in connection with extensions of credit they make. National banks' debt cancellation contracts and debt suspension agreements are governed by this part and applicable Federal law and regulations, and not by part 14 of this chapter or by State law.

12 CFR 37.1(c).

Restrictions on a national bank's ability to impose fees have consistently been held to be preempted by section 24(Seventh) and 7.4002.[100] The fees at issue here are fees that a national bank may charge in the exercise of its authority under section 24(Seventh) and § 7.4002. In accordance with the case law, the GFLA's attempt to prevent national banks from charging these fees is, therefore, preempted.

D. Certain GFLA Provisions Are Moot in Light of the Preceding Analysis

- Structuring. The GFLA provides that no person may avoid application of the law by dividing one loan transaction into separate parts or structuring a home loan transaction as an open-end loan for the purpose of evading a provision of the GFLA.

- Severability. As described above, the GFLA provides that if any portion of it is declared to be invalid or preempted by Federal law or regulation, the validity of its remaining provisions will be not be affected.

- Disclosure required. Documents that create a debt or pledge property as collateral for a high-cost home loan must contain a notice specifying that the mortgage is subject to special rules under GFLA and that purchasers or assignees may be liable for all claims and defenses of the borrower.

The structuring provision has the salutary goal of preventing evasion of the state law. The question whether the provision applies to National City is moot, however, because, for the reasons set forth above, the substantive provisions of the GFLA are inapplicable. Accordingly, there is no state law to evade. For the same reason, the severability clause and disclosure requirements are also moot.

[100] See supra notes 56-60 and accompanying text.

As mentioned above, some commenters argued that the OCC does not enjoy exclusive visitorial powers over national banks under 12 U.S.C. 484. These commenters assert that section 484 does not prevent state officials from suing in state courts to enforce applicable laws against national banks. It is unnecessary to address this issue, or other provisions related to enforcement of the GFLA, because the GFLA is not applicable to national banks.

E. Applicability of the GFLA to National Bank Operating Subsidiaries

As mentioned above, pursuant to their authority under 12 U.S.C. 24(Seventh) to exercise "all such incidental powers as shall be necessary to carry on the business of banking," national banks have long used separately incorporated entities to engage in activities that the bank itself is authorized to conduct. This authority to operate through such subsidiaries has been expressly recognized for nearly 40 years.

In 1966, the OCC issued rules codifying and regulating the authority of national banks to engage in activities through operating subsidiaries.[101] The current version of this Operating Subsidiary Rule, codified at 12 CFR 5.34, specifies the licensing requirements when national banks seek permission from the OCC to conduct business through an operating subsidiary.[102] Pursuant to this licensing process, the OCC licenses the operating subsidiary as a means through which a national bank is authorized to conduct activities permissible for the bank itself. That this relationship involves the bank conducting activities through the operating subsidiary is reflected in the express language of the regulation, which provides that "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly

[101] See 31 FR 11459 (Aug. 31, 1966).
[102] See 12 CFR 5.34(b).

either as part of, or incidental to, the business of banking, as determined by the OCC, or otherwise under other statutory authority."[103]

Moreover, the regulation makes clear that in conducting permissible activities on behalf of its parent bank, the operating subsidiary is acting "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[104] These regulations reflect express Congressional recognition in section 121 of the GLBA that national banks may own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[105]

When established in accordance with the procedures mandated by the OCC's Operating Subsidiary Rule and approved by the OCC, the operating subsidiary is a Federally-authorized means by which a national bank may conduct Federally-authorized activities. Recognizing this status, courts have consistently treated the operating subsidiary and the national bank as equivalents, unless Federal law requires otherwise, in considering whether a particular activity

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[103] 12 CFR 5.34(e)(1).
[104] 12 CFR 5.34(e)(3).
[105] Pub. L. 106-102, § 121, 113 Stat. 1338, 1373 (1999), codified at 12 U.S.C. 24a(g)(3)(A) (emphasis supplied). One commenter argued that this section of GLBA only permits national banks to establish financial subsidiaries that are authorized to engage in activities that are not permissible for the bank and is intended solely to limit the authority of financial subsidiaries by stating that the definition of financial subsidiaries does not include operating subsidiaries. Thus, this commenter argues that this section of GLBA does not grant any powers and does not express any intent to bar the states from regulating operating subsidiaries. In Nat'l City Bank of Indiana v. Boutris, Civ. No. S-03-0655 GEB JFM (E.D.Cal. May 7, 2003), a Federal district court rejected a similar argument. In so doing, the Court noted that "[n]ot only does this language [of GLBA section 121] reference operating subsidiaries, it indicates the OCC exercises visitorial authority over them." Id. at 11. Moreover, as the Court also pointed out, the Report of the Senate Committee on Banking, Housing, and Urban Affairs on GLBA noted that:

> For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national bank may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonbank companies.

was permissible for a national bank.[106] Recently, in Wells Fargo Bank, N.A. v. Boutris,[107] a Federal district court issued a permanent injunction enjoining the Commissioner of the California Department of Corporations from exercising visitorial powers over a national bank operating subsidiary. In so doing, the Court took note of this well-established case law and concluded that "[t]he OCC's regulation authorizing national banks to conduct permissible banking business activities through operating subsidiaries is within its discretionary authority delegated to it by Congress and is a reasonable interpretation of the Act."[108] Similarly, in National City Bank of Indiana v. Boutris,[109] a Federal district court enjoined California officials from exercising visitorial powers over National City Bank of Indiana and its operating subsidiary, National City Mortgage Company.

In accordance with this longstanding regulatory and judicial recognition of operating subsidiaries as corporate extensions of the parent bank, OCC regulations specifically address the application of state law to national bank operating subsidiaries. That regulation provides:

> Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.[110]

S. Rep. No. 106-44, at 8 (1999).

[106] See Variable Annuity Life Ins. Co., 513 U.S. at 254 (brokerage subsidiary acting as an agent in the sale of annuities); Marquette, 439 U.S. at 299 (credit card subsidiary); American Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988) (subsidiary offering municipal bond insurance); M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977) (motor vehicle leasing by subsidiary).

[107] 2003 WL 21277203 (E.D.Cal. May 9, 2003).

[108] Id. at *6.

[109] 2003 WL 21536818 (E.D.Cal. July 2, 2003).

[110] 12 CFR 7.4006. One commenter argues that the OCC cannot rely on this regulation because the commenter contends that the OCC failed to abide by Executive Order 13132 in promulgating it. We disagree. Executive Order 13132 requires intergovernmental consultation if a rule preempts state law, and an agency must consult to the extent practicable with state and local officials early in the process of developing the proposed regulation. Office of Management and Budget guidance on the Executive Order notes that the consultation "should seek comment on . . . preemption as appropriate to the nature of the rulemaking under development. The timing, nature, and detail of the consultation involved should also be appropriate to the nature of the regulation involved." M-00-02, "Guidance for Implementing E.O. 13132, 'Federalism,'" at 5 (Oct. 28, 1999), available at

The provisions of part 34 expressly apply equally to national banks and their operating subsidiaries:

> This part applies to national banks and their operating subsidiaries as provided in 12 CFR 5.34.[111]

Accordingly, the same preemption conclusions about the GFLA reached above for national banks pursuant to sections 34.4(a) and (b) of the OCC's regulations, and those concerning the GFLA's restrictions on components of interest[112] or fees, apply equally to their operating subsidiaries.

IV. RESULTS OF THE ANALYSIS

For the reasons stated above, we are issuing an order concluding that the GFLA does not apply to National City or any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia. This order is expressly authorized by section 371.[113] The authority vested in the OCC to establish the terms, conditions, and requirements that

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http://www.whitehouse.gov/omb/memoranda/m00-02.pdf. This process was followed in connection with the promulgation of § 7.4006. As we explained in the preamble to the final rule adopting § 7.4006:

> In addition to publishing our proposal for comment by all interested parties, including State and local officials, we also brought the proposal to the attention of the Conference of State Bank Supervisors and specifically invited its views, and the views of its constituent members, on the revisions we proposed. In the preamble to this final rule, we have described the comments we received from State officials or their representatives and our responses thereto. Finally, we have made those written comments we received from State or local officials available to the Director of OMB.

66 FR 34784, 34790 (July 2, 2001).

The same commenter argues that this order or determination should be delayed until the requirements of Executive Order 13132 have been met by the OCC. We note that the consultative process required by the Executive Order has been met by our solicitation (and receipt) of comment from interested parties.

[111] 12 CFR 34.1(b).

[112] See OCC Interpretive Letter No. 954 (Dec. 16, 2002) (12 U.S.C. 85 applies equally to national bank operating subsidiaries and their parent national banks).

[113] Even if the OCC's express authority under § 371 were construed not to be broad enough to permit it to issue this order, the Administrative Procedure Act (APA) authorizes agencies to issue orders "to terminate a controversy or remove uncertainty." 5 U.S.C. 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."). Although section

apply to national bank real estate lending necessarily encompasses the authority to say which terms, conditions, and requirements do not apply to national bank real estate lending. This Order has the force and effect of law.[114]

ORDER

The conditions imposed by the GFLA on the real estate lending activities of national banks do not apply to National City, or any other national bank, or national bank operating subsidiary, that engages in real estate lending activities in Georgia.

____________________________________ __________________

John D. Hawke, Jr. Date
Comptroller of the Currency

554(e) is contained within the APA provisions for matters that are required by statute to be determined on the record after an opportunity for a hearing, there is considerable case law and agency practice of issuing orders in other circumstances. For example, in American Airlines, Inc. v. Dep't of Transp., 202 F.3d 788 (5th Cir. 2000), the court of appeals upheld a DOT declaratory order under section 554(e) that preempted certain municipal regulations. The court specifically found authority for such an order and that procedural provisions of section 554 were not applicable. In short, the court found that section 554(e) was a source of authority for a declaratory order independent of the remainder of section 554.

Examples of agencies issuing legally binding orders pursuant to authority other than section 554(e) of the APA are numerous. For example, under section 3 of the Bank Holding Company Act, applications to become a bank holding company are approved by Federal Reserve Board orders. In Farmers & Merchts. Bank of Las Cruces v. Bd. of Governors of Fed. Reserve Sys., 567 F.2d 1082 (D.C. Cir. 1977), the court of appeals affirmed the Board's order approving the formation of a holding company, noting that the protesting bank had no right to a hearing before the Board in light of the OCC's recommended approval of the acquisition. A similar result was reached in Grandview Bank & Trust Co. v. Bd. of Governors of Fed. Reserve Sys., 550 F.2d 415 (8th Cir. 1977).

[114] As noted above, the OCC is issuing at the same time as this Determination and Order is issued a Notice of Proposed Rulemaking that invites comments on a proposed codification of broadly applicable preemption provisions. We have elected to respond to National City through an order given the narrower focus of the request.